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No. 96-338

IN THE
Supreme Court of the United States
October Term, 1996

BURTON KAHN,

Petitioner

v.

BEICKER ENGINEERING, INC., DAVY L. BEICKER AND MICHAEL J. ZEZULA,

Respondents

On Petition for Writ of Certiorari to
The Supreme Court of Texas

Brief in Opposition to the Petition for Writ of Certiorari to the Supreme Court of Texas

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QUESTIONS PRESENTED

The questions presented by Petitioner were never raised or ruled upon in the state trial, appellate or supreme courts of Texas; they were never passed on by those courts. These questions are raised for the first time in the Petition for Writ of Certiorari, and would not properly be before the Court if Certiorari were granted.

NOTE: Beicker Engineering, Inc. has no parent or subsidiary company.

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Beicker Engineering, Inc., Davy L. Beicker and Michael J. Zezula respectfully make and file this their Brief in Opposition to the Petition for Writ of Certiorari to the Supreme Court of Texas filed herein by Burton Kahn and would respectfully show unto the Court as follows:

JURISDICTION

Petitioner attempts to invoke the jurisdiction of this Court without proper justification. 28 U.S.C. § 1257(2) was revised in 1988. No condition under 28 U.S.C. § 1257(a) exists.

The Texas state courts at the trial, court of appeals and Texas Supreme Court level did not consider or rule upon the constitutional issues that Petitioner attempts to raise in this Court. The questions Petitioner seeks to have reviewed were never raised in state courts. Petitioner attempts to raise these questions for the first time on Writ of Certiorari. The questions are not properly raised to invoke the jurisdiction of this Court. No condition under 28 U.S.C. 1257(a) exists. There is no conflict between courts nor is there an important matter of federal law presented that should be settled by this Court.

Since the questions presented by Petitioner are presented improperly, not having been raised or ruled upon in any state court, the questions are not properly raised in this Court.

STATEMENT OF THE CASE

Petitioner, Burton Kahn (hereinafter "Kahn"), filed suit against Beicker Engineering, Inc., Davy L. Beicker and Michael J. Zezula (hereinafter "Beicker"). The suit alleged libel rising from work Beicker had done as an engineering consultant concerning the adequacy of a certain concrete slab engineered by Kahn. Kahn, in his suit failed to allege any defamatory words used, or the date of publication or the person or persons to whom the supposed libel had been published.

Beicker filed and served Special Exceptions to Kahn's Petition, which were included in Beicker's First Amended Original Answer filed and served on July 30, 1994 (Tr. at 33) and, after setting the objections for hearing, filed and served the Answer containing the Special Exceptions, together with the Fiat or notice of setting for hearing, on August 3, 1994. The service and mailing with the Fiat was received by Kahn through his agent, which Kahn acknowledged. A copy of the signed U.S. Postal Service Domestic Return Receipt of delivery is contained in the record (Tr. at 189). Kahn failed to attend the hearing. The trial court sustained Beicker's Special Exceptions and gave Kahn ten (10) days to amend his petition, directing that failure to amend his petition would result in the petition being dismissed with prejudice (Tr. at 137).

On August 25, 1994, the trial court, acting in accordance with its prior Order sustaining the Special Exceptions — Kahn having failed to amend his pleadings — dismissed Kahn's cause of action (Tr. at 138). There was no Motion to Dismiss, nor was a hearing held on a Motion to Dismiss. No motion was required. Kahn, thereafter, filed with the trial court a Motion to Reinstate

and a Motion for New Trial and Second Motion to Retain (Tr. at 140, 154). Kahn attached to the Motion to Reinstate an Affidavit in which he denied having received both the Special Exceptions and the Fiat setting the hearing on same, despite the fact that the Special Exceptions and the Fiat were integral parts to the single document that he received, and that he acknowledged receiving (Tr. at 142). The trial court overruled both Motions (Tr. at 209).

Petitioner then appealed to the Fourth Court of Appeals in Bexar County, Texas. He filed an Appellant's brief and, after the court of appeals affirmed the trial court's dismissal, he filed a Motion for Rehearing, a Second Motion for Rehearing and a Second Motion for Rehearing *En Banc*, which were denied. Petitioner did not raise the questions relied upon in this Court either at the trial court or at the Texas Fourth Court of Appeals. Petitioner applied for Writ of Error to the Texas Supreme Court, raising the same questions ruled upon by the lower courts. The federal questions raised for the first time in this Court were not raised in the Texas Supreme Court nor were they ruled upon there.

REASONS FOR DENYING THE WRIT

Petitioner raises in the Petition for Writ of Certiorari two questions which were neither raised nor ruled upon in the Texas court of first instance or in the Texas appellate courts. If the claim was not raised or addressed in prior proceedings, the Court's practice would be to decline review. ***Yee v. Escondido***, 503 U.S. 519 (1992). ***See also Tacon v. Arizona*** 410 U.S. 351 (1973). Petitioner's Petition for Writ of Certiorari does not

comply with Supreme Court Rule 14.1(g)(i) which requires specification of the stage when the federal questions were raised, the method and manner of raising them and the way the questions were passed on by the state courts, with specific reference to the record showing where the matter appears.

Nowhere in Petitioner's Petition do any of the matters required by Supreme Court Rule 14.1(g)(1) appear. The purpose of this requirement is stated in the rule: "so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari." If the federal question raised in the U.S. Supreme Court was not presented in the state courts, the Supreme Court has no power to consider it. ***Street v. New York***, 394 U.S. 576 (1969).

The Judiciary Act of 1789 provided no jurisdiction in the absence of a federal question raised and decided in the state courts. If these criteria are not met, there is no jurisdiction. ***Illinois v. Gates***, 462 U.S. 213 (1983). ***See also State Farm v. Duel***, 324 U.S. 154 (1945). If the state court did not rule on a question the Supreme Court cannot consider it.

It is required that the Petitioner specify the stage, in both the court of first instance and the appellate court, at which the federal question was raised, the means of raising the question and the ruling. Where no federal question was ever presented, let alone passed upon, the Court has no jurisdiction. ***Webb v. Webb***, 451 U.S. 493 (1981). In ***Webb***, the Court stated it saw no reason to deviate from that rule.

This Court has, on a number of occasions, encountered similar situations in which the questions raised had not been raised in the state courts. The Supreme Court does not decide a question raised for the first time in the Supreme Court and not raised in the lower courts. ***Taylor v. Freeland & Kronz***, 503 U.S. 638 (1992). In ***Evans v. Reed***, 430 U.S. 975 (1976), the Court denied the Petition for Writ of Certiorari for want of a properly presented federal question. In ***Monks v. New Jersey***, 398 U.S. 71 (1970), a claim on a federal question raised for the first time in a Petition for Writ of Certiorari resulted in dismissal of the Writ as improvidently granted when the Court discovered the lack.

When the highest state court has not considered a question it will be assumed the omission was due to lack of proper presentation. ***Id. See also Colorado v. Nunez***, 465 U.S. 324 (1984).

The Supreme Court will not address claims of violations of the U.S. Constitution Due Process clause when the claims were not previously ruled upon below. There should be no doubt that a federal constitutional claim was made in the state courts and presented in the manner required by state law. ***Banker's Life v. Crenshaw***, 486 U.S. 71 (1988). The Petition for Writ of Certiorari should be denied for want of jurisdiction.

The Petition alleges dismissal of the Petitioner's cause of action resulting from Respondent's Motion to Dismiss in the trial court. In fact, as pointed out by the Texas Court of Appeals in its Opinion, the trial court dismissed because Petitioner (Plaintiff below) failed to amend his Petition in conformity with the Court's Order within ten (10) days of the date of the Order. The

Order granting Special Exceptions was sent to Petitioner and was received by him (Tr. at 177, 201-202). The Special Exceptions upheld by the trial court concerned the failure of the Petition in that court to allege, in the words used, the allegedly libelous matters complained of. In ***Runge v. Franklin***, 10 S.W. 721 (Tex. 1889), the Texas Supreme Court stated that "the very language relied on as libelous must be set out in a petition for libel." That rule has been followed in all cases involving allegations of libel.

Petitioner did receive, and acknowledged having received, the correspondence containing notice of hearing on Special Exceptions. He was, additionally, charged with notice of all steps taken and in the file. ***Smith v. Nguyen***, 855 S.W.2d 163 (Tex. App. — Houston [14th Dist.] 1991, no writ). In ***Centennial Ins. v. Commercial Union Ins.***, 802 S.W.2d 479 (Tex. App. — Houston [14th Dist.] 1991, no writ), the Texas Fourteenth Court of Appeals correctly stated the law that applies:

> Under the Texas Rules of Civil Procedure, the proper way for a defendant to urge that a Plaintiff has failed to plead a cause of action is by special exception....
>
> [T]he pleader must be given an opportunity to replead.... [A]fter special exceptions have been sustained and a party has been given an opportunity to amend its pleadings, the case may be dismissed.... ***Id.***

The Writ petitioned for should be denied. The questions presented for review cannot confer jurisdiction because they were never raised in the Texas state courts and, therefore, not decided there. The Court has consistently refused to decide such issues not raised in state courts. That should be the result in the present case.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Writ of Certiorari.

Respectfully Submitted
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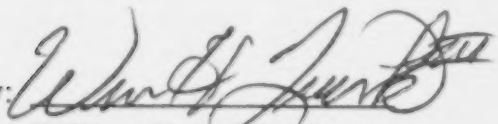
By: 
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